TC03364

Appeal number: TC/2010/08647

VAT – Place of Supply – organisation of enclosure at Farnborough air show – whether advertising services or exhibition.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FINMECCANICA GROUP SERVICES SPA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at 45 Bedford Square WC1B on 21, 22, and 23 January 2014

Timothy Brown, instructed by The VAT Consultancy for the Appellant

Michael Jones , instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The issue at the core of this appeal is whether the service provided by Finmeccanica Group Services Spa ("FGS") in arranging, for its sister subsidiaries of the Finmeccanica group, an enclosure at the Farnborough air show to which those sister companies invited customers, potential customers and the press (but to which the general public was not admitted) was for VAT purposes the provisions of the service of organising an exhibition or a fair, or in the nature of an advertising service.

2. This issue arises because FGS, a company established, like its sister companies in Italy, made claims under the Refund Directive (and its predecessors) for the repayment of the UK VAT charged to it by the suppliers of the goods and services it used in connection with the provision of the enclosure. That Directive, and its predecessors, provides that such a refund is not available if the claimant makes any supply in the UK.

3. HMRC say that, in providing the benefits of the Farnborough enclosure to its sister companies, FGS made a supply in the UK because that supply was organising an exhibition or fair within what I shall call the Article 9(2)(c) 'event' provisions and so was deemed by that provision to be made in the UK: thus a refund was not available under the Refund Directive even though input tax credit might have been available against the VAT on FGS's onward supply to its sister companies.

4. FGS says that the nature of its supply to its sister companies was not in the nature of an entertainment provided to visitors at a fair or exhibition within the Article 9(2)(c) 'event' provisions, but a marketing event which had the nature of an advertising service of the type described in what I shall call the Article 9(2)(e) provisions, and is to be treated as made in the State of the recipient of the supply, that is to say Italy and not the UK. Therefore they say a refund is available.

The legislation

5. FGS made three claims: one for the period from 1 May 2008 to 31 December 2008, and one for each of the two succeeding 12 month periods. Unfortunately the relevant EU (and UK) legislative provisions changed in this period.

6. From before 1 May 2008 to 1 January 2010 Article 43 of the Principal VAT Directive set out a general rule that the place of supply of a service was to be taken as the place of establishment of the *supplier*, and Articles 44 to 59 set out specific rules for the place of supply of specific services. The drafting of these provisions followed that previously found respectively in Article 9(1) and 9(2) of the Sixth directive.

7. In a number of cases the ECJ has made it clear that the specific, Article 9(2), rules are not to be regarded as exceptions from the general rule, but rather that the general rule is a default rule which applies where the place of supply is not determined by a specific rule.

8. From 1 January 2010 Articles 43 to 59 were replaced by new Articles which contained a new general rule that the place of supply to a taxable person was the place of establishment of the *customer*, and rules for specific supplies which followed the former rules but were not quite the same. Unhelpfully the numbering of the Articles dealing with the specific supplies changed. However each contained some version of the rules in relation to events and advertising services originally found respectively in Articles 9(2)(c) and (e) of the Sixth Directive.

9. For simplicity and neutrality of terminology, and because many of the CJEU cases cited referred to the provisions of the Sixth Directive, I shall refer to the services described in relevant provisions by their numbering in that Directive.

Article 9(2)(c) 'event services'

10. The old Article 52(a) of the Principal VAT Directive had, in subparagraph (a), copied the words of the former Article 9(2)(c) of the Sixth Directive, and had provided:

> "The place of supply of the following services shall be the place where those services are physically carried out:
>
> > (a) cultural, artistic, sporting, scientific, educational, entertainment or similar activities including the activities of the organiser of such activities and, where appropriate, ancillary services;
> >
> > (b) ...

11. The following is the new Article 53:

> "The supply of services and ancillary services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs or exhibitions, including the supply of services of the organisers of such activities, shall be the place where those activities are physically carried out."

12. It will be seen that both versions set out a list of specified activities and add the words "or similar activities", but that there are two differences between the new and old versions of the Article 9(2)(c) provisions:

> (1) the qualification of ancillary services by "where appropriate" has been removed; and
>
> (2) in the new version the words, "such as fairs or exhibitions" have been added after a comma.

13. The first of these changes reflected the judgement of the ECJ in *Dudda v Finanzamt Bergisch Gladbach* [1996] STC 1290 where it had held at [30] that "where appropriate" simply indicated that there might not always be "an activity ancillary to the principal artistic or entertainment activity".

14. In relation to the second change Mr Jones contended that the addition of the words "such as fairs or exhibitions" reflected the ECJ's judgement in *Gillan Beach Limited v Ministre de L'Economie* C- 144/05. In that case the ECJ concluded that:

> "[29] [Article 52 old form] must be interpreted as meaning that an inclusive service provided by an organiser to exhibitors at a fair or in an exhibition hall falls within the category of services referred to in that provision."

I shall return to this later.

15. After 1 January 2011 the new Article 53 was amended so that it applied only to admission to events of the nature described in that Article.

16. Later on in this decision I have used "the specified activities" to refer to cultural, artistic, sporting, scientific, educational and entertainment activities; excluding therefore in my use of that phrase "similar activities".

Article 9(2)(e) Advertising Services

17. Article 9(2)(e) provided a list of miscellaneous services which, when supplied to "taxable persons established in the Community but not in the same country as the supplier" were to be treated as supplied in the State of establishment of the customer. The list included the following:

> "(a)
>
> (b) advertising services
>
> ...
>
> (f) the supply of staff;
>
> (g) the hiring out of movable tangible property with the exception of all means of transport ..."

18. In the Principal VAT Directive old Article 56 (which was materially the same as Article 9(2)(e) of the Sixth Directive) was replaced on 1 January 2010 by new Article 58. Both old Article 56 and new Article 58 contained the same list of miscellaneous services which were to be treated as supplied where the customer was established. The difference between the two Articles lay in the opening words, the old Article 56 stating:

> "The place of supply of the following services to customers established outside the Community or to taxable persons established in the community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment from which the services provided ...",

whereas the new Article 59 stated:

> "The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides ...".

19. So far as relevant to this appeal, each version of the Article listed the services in the original Article 9(2)(e). The difference between the two formulations arose

because of the change to the general rule. To the extent that services were, under the new general rule, treated as supplied where they were received, there was no need for this miscellaneous services Article also to provide that such was their place of supply. The new general rule applied to services supplied to a taxable person - deeming them to be supplied in the State it was established. As a result all that remained for the new miscellaneous services article to fasten upon were supplies to a non-taxable person established outside the EU.

20. Before leaving the opening words of these Articles I should draw attention to the formulation in the old Article (and Art 9(2)(e)) which limited its application to services provided to non-EU customers and to taxable persons established in the Community "but not in the same country as the supplier".

21. The underlined words meant that this Article did not apply where for example a supplier established in Italy made a supply to customers established in Italy, whereas it did apply to the same service supplied by a supplier established in France to a customer established in Italy. I shall return to the underlined words later.

The Refund Directive and the Eighth Directive.

22. The Eighth Directive 79/1072/EEC, and after 1 January 2010, the Refund Directive 2008/9/EC, set out the detailed rules for the refund of VAT suffered on supplies made in one State to taxable persons established in another State. Each Directive made it a condition of the refund that, with the exception of certain supplies irrelevant to this appeal, the claimant made no supplies of goods or services in the State in which the VAT for which refund was claimed was suffered. In this appeal nothing turns on the detailed provisions of these Directives.

The Domestic Legislation.

23. For the period up to 1 January 2010 the UK enacted the provisions of the old Articles relating to place of supply in section 7 and Schedule 5 VAT Act 1994 and the Value Added Tax (Place of Supply of Services) Order 1992. Section 7(10) VATA provided the general rule that the place of the supply of a service was the place of establishment of the supplier, and paragraph 15 of the Order contained the Article 9(2)(c) 'events' provision in the following terms:

> "15. Where a supply of services consists of:
>
> (a)cultural artistic, sporting, scientific, educational or entertainment services;
>
> (b) services relating to exhibitions, conferences or meetings;
>
> (c) services ancillary to, including those of organising, any supply as a description within paragraphs (a) or (b) above; or
>
> (d) valuation work ...
>
> it shall be treated as made where the services are physically carried out.

In effect the UK legislature took the “similar services” of the Directive to comprise “exhibitions, conferences, or meetings”.

24. Regulation 16 of the Order provided that the services listed in Schedule 5 were to be treated as supplied where received, and Schedule 5 listed:

> "1. Transfers and assignment of copyright, patterns, licenses, trademarks and similar rights.
>
> 2. Advertising services.
>
> 3. Services of consultants, engineers ...
>
> 6. The supply of staff
>
> 7. Letting on a hire of goods other than means of transport."

25. After 1 January 2010 the provisions of the new Articles of the Principal Directive were reflected in Schedule 4A and Schedule 5 VATA, Schedule 5 remaining as set out above, and paragraph 4 Schedule 4A providing, in words more precisely following the Directive, that the supply of

> "(a) services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities (including fairs and exhibitions), and
>
> (b) ancillary services relating to such activities, including services of organisers of such activities"

were to be treated as made where they were carried out.

26. The application of the relevant provisions to fairs and exhibitions is noteworthy. The old Directive provisions carried no mention of them, but regulation 15 of the Order specifically embraced "services relating to exhibitions, conferences or meetings". The new Directive, after the lists of cultural etc activities, included the new words "such as exhibitions or fairs", and schedule 4A said "including fairs and exhibitions". I discuss later whether the U.K.'s provisions are to any relevant extent wider than those of the Directives in this regard.

27. In the 1995 VAT Regulations 1995/2518 the UK enacted detailed rules for the refund of the VAT to non-UK established taxable persons, providing, consistently with the Directives, that a person did not qualify for a refund if he had made in any part of the repayment period supplies in the UK (other than supplies irrelevant to this appeal).

28. If FGS are entitled under the Directives to refund of VAT there is no doubt that this tribunal should give effect to this entitlement whether by reading the domestic provisions consistently with the Directives or otherwise. The appeal depends upon the effect of the provisions of the Directives.

The Evidence and the Facts.

29. I heard the oral evidence of Riccardo Napolitano, the General Manager of FGS, saw a video recording of part of the 2010 show pavilion and had other documentary evidence.

30. It was common ground that each relevant company in the group was established and separately VAT registered in Italy, and that FGS' supplies to its sister companies were not made to a fixed establishment of those companies outside Italy. It was also common ground that the enclosure at Farnborough was not a fixed establishment of FGS.

31. The Finmeccanica group companies are leading suppliers of aerospace, defence and security equipment. In 2009 the group's turnover was some €18 billion. Included among its operational companies are Augusta Westland and SELEX. What the group's products have in common is engineering sophistication. They range over participation in the Eurofighter Typhoon, helicopters, space stations, communications and security systems. This diversity presents a challenge in enabling outsiders to see the connection between the group's various operations. Addressing that challenge was one which the organisers of the 2010 enclosure sought to address.

32. FGS is a group service company. Its activities include acting as a central purchasing entity for products and services which are not critical to production equipment such as cleaning, transport, security, property, meetings and events.

33. The Farnborough International air show takes place every other year. It is possibly the world's premier show of its type. In the intervening years there is the Le Bourges air show in France, and the DSEi show at the Excel centre, at each of which FGS also organises an area of display. The DSEi event is smaller but similar in concept.

34. The Farnborough air show is an event which involves a public show but also the display by major aerospace companies of their products to potential buyers from around the world. As Mr Napolitano said the world's biggest players attend these shows.

35. The Finmeccanica group's marketing strategy involves having an enclosure at each Farnborough air show.

36. In 2010 the group's enclosure at Farnborough air show consisted of a pavilion covering about an acre (4,280 m²) which included two chalets, and a static display of about 1 ½ acres (7,630 m²). The total cost associated with the enclosure was some €14 million in 2010 (€12m for 2008). It was a very substantial exercise. In the open area were displayed a large number of helicopters and fighter aeroplanes; in the pavilion there were areas devoted to particular sister companies' products, meeting rooms etc. The 2008 event was on a similar scale.

37. I have used "enclosure to describe the area involved and there was indeed a ring fence around the area described above, but the 2010 brochure "Finmeccanica at Farnborough" shows that in addition to the main enclosure there were other Finmeccanica buildings including a Eurofighter chalet. By far the dominant area is the

main enclosure. I have used “enclosure” to refer to the totality unless the contrary is indicated.

38. The arranging of the enclosure is the responsibility of FGS. The central administrative function of the group sets the budget for the occasion and specifies an outline the requirements for the overall appearance, themes and the space required for each sector of the group: thus, much oversimplified, its requirements might include a requirement to display eight helicopters and five fixed wing aircraft, to have a lecture theatre with say 200 seats, a separate security systems chalet as part of the enclosure, five meeting rooms and 40 display screens. FGS then discusses this with its sister companies and engages architects to design the pavilion and the enclosure. It discusses the designs with the group companies involved and then, once it has settled on the design, sets about renting space from Farnborough International, the organisers of the airshow, the building of the enclosure, and the organisation of the event.

39. The planning of the event takes about a year. In the course of that year FGS organises and monitors the implementation of contracts for the building works, electricity, gas, plumbing, IT, safety equipment, signage (in particular the display of the “tag” for the year) , security, catering, travel and cleaning of the enclosure. It makes arrangements for a press reception and tickets for invitees. It produces a brochure. It arranges speakers. It arranges recordings of the event for the group companies.

40. People wishing to enter the enclosure must have (at least) two passes - one permitting them to enter the airshow and one permitting them to enter the Finmeccanica enclosure. In 2010 there were two separate chalets within the enclosure which required distinct passes, one of which was for Westland. FGS's sister companies indicate whom they wish to invite to the enclosure and FGS obtains passes for them from Farnborough International, the organiser of the air show, and issues separate passes for the enclosure. These invitees are known customers and potential purchasers of the group's equipment and will include military, government and institutional figures.

41. The air show maintains a list of those people other exhibitors have invited, and FGS or its sister companies may offer invitations to customers of other exhibitors they see on the list.

42. Invitations and passes are issued to the press. FGS organises a press reception in conjunction with the show. This is the only part of the event which takes place outside the enclosure. Mr Napolitano was not willing to say why the press were invited – it was a decision made by the marketing and external relations functions in the group. It seemed to me that they were invited to preserve and enhance the external reputation of the group companies.

43. Mr Napolitano told me that if a person wished to enter the enclosure he or she needed a Finmeccanica pass. In the Information Pack for 2010, there was a section headed Rules and Regulations. In this:

(1) Clause 1.3 said that the chalets and the stand were reserved to Finmeccanica personnel and their guests,

(2) Clause 2 said that access to the chalet in the pavilion was permitted only on showing a separate pass;

(3) Clause 4 said that part of the Finmeccanica stand was open to the public

(4) Clause 6 said that the static area (1½ acres displaying helicopters and aircraft) was open only to guests accompanied by Finmeccanica personnel.

I concluded that at most a negligible part of the enclosure was open to the general public.

44. The airshow lasts a week. In such a week some 200 high-level guests (ministers and senior military figures) would be expected to attend the enclosure and more than 1000 potential customers altogether (Mr Napolitano could not be certain how many: he did not dissent from 1000 and was able to say it was less than 10,000). There is a programme for the week - organised by FGS - which includes debates, and talks by outside speakers and speakers from the group.

45. Some 120 group employees are present in the enclosure. Of these about 15 are FGS staff concerned with ensuring that the event runs smoothly - monitoring and servicing the infrastructure, security, catering for staff and the guests and cleaning, and arranging meeting rooms (where presentations are made to specific guests). The remainder are employees of group companies – marketing, external affairs, technical and IT support people. FGS arranges the hotel accommodation and the flights for all the group's staff

46. FGS invoiced its sister companies for its services. It is charged the costs incurred with no markup. It included, and accounted for Italian VAT on its invoices.

47. It was clear to me that the sole object of the provision of the enclosure and associated services by FGS to its sister companies was to enable those companies to sell their products.

The parties' submissions.

48. Mr Jones relies on *Gillan Beach*. He says that the supply in that case was held by the CJEU to fall within Article 9(2)(c) and was thus deemed to be made where the show physically took place. He says that the supplies made by FGS to its sister companies were materially similar to those supplied by Gillan Beach and fall to be treated in the same way. He says that the effect of the CJEU's judgement in *Gillan Beach* is that the organising of fairs and exhibitions falls within the Article 9(2)(c) 'events' provision both before and after the replacement of the old Article with the new one. FGS was the organiser of an exhibition, so its services fell squarely within this Article.

49. Gillan Beach organised two boat shows. It supplied exhibitors with a service which included the setting up of stands, means of communication, staff to welcome guests, moorings and surveillance. The Court was asked whether these services fell

within Article 9(2)(c) or any other category within Article 9(2). The Court limited its consideration to Article 9(2)(c) 'events' and held that the "service provided by an organiser to exhibitors at a fair or in an exhibition hall" fell within Article 9(2(c) as the organisation of 'similar activities'. Having come to that conclusion it said [28] that there was no need to adjudicate on whether the service fell within any other category in Article 9(2).

50. In the course of its judgement the Court set out the common features of the services which fell within the specific categories in Art 9(2)(c) 'events'. It said that services would be "similar" if they included features also present in the specified services "and which provide objective justification for the application of that provision". The ECJ considered the purpose of Article 9(2) and said [18] that in Article 9(2)(c) the legislature had considered that where the service was provided in the State where "such services are physically carried out and the organiser of the event charges the final consumer in the same State", the VAT on those services should be paid in that State. It continued:

> [22] In view of the objectives sought by the Community legislature, as referred to in paragraph 18 above, which is to fix the place of taxable transactions in the Member State in the territory of which the services are physically carried out, wherever the person providing the service has established his business, an activity must be regarded as similar, within the meaning of the first indent of Article 9(2)(c) of the Sixth Directive, where it includes features that are also present in the other categories of activities listed in that provision and which, in the light of that objective, provide justification for the application of that provision to those activities.
>
> [23] In that regard, there are grounds for stating ... that the features common to the various categories of its services referred to in the first indent of Article 9(2)(c)..originate in the complex nature of the services concerned, which are various services, and in the fact that these services are generally provided for in number of different recipients, that is to say, all the people taking part, in a variety of capacities, in cultural, artistic, sporting, scientific, educational or entertainment activities.
>
> [24] Those various categories of services also have the common feature that they are usually provided for specific events, and the place where those complex services are physically carried out is easy to identify, as a rule, since such events take place at specific locations.
>
> [25] A show or fair, whatever its theme, seeks to provide to a number of different recipients, as a rule in a single place and on a single occasion, a variety of complex services, with the purpose, in particular, of presenting information, goods or events in such a way as to promote them to visitors. In those circumstances, it must be possible to regard a show or fair as being covered by the similar activities referred to in [Article 9(2)(c) 'events']…
>
> [27] It follows that the inclusive service provided to exhibitors by the organiser of a fair or show must therefore be regarded as being one of the services referred to in the first indent of Article 9(2)(c) ...".

51. Mr Jones says that the services provided by FGS share the common features described by the ECJ. In particular there was a specific event at a specific location.

52. Mr Brown says that FGS supplied advertising and promotional services to its sister companies. He refers me to *Commission v France* (C- 68/92) in which the ECJ considered whether promotional activities constituted advertising services within the meaning of article 9(2)(e). It held that:

> "[16] The concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. Although that message is usually spread, by means of spoken or printed words and/or pictures, by the press, radio and/or television, this can also be done by the partial or exclusive use of other means. ...
>
> "[18] It is therefore sufficient that a promotional activity, such as the sale of goods at reduced prices, the handing out to consumers of goods sold to the person distributing them by an advertising agency, the supply of services at reduced prices or free of charge, or the organisation of a cocktail party or banquet, involves the dissemination of a message intended to inform the public of the existence and qualities of the product or service which is the subject matter of the activity, with a view to increasing the sales of that product or service, for the activity to be characterised as an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive.
>
> "[19] The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to conveying the advertising message. This is the case with regard to the production aids used for a particular advertisement."

53. He refers to *Design Concept SA v Flanders Expo SA* (C- 438/01) in which the ECJ considered the provision of services in connection with a trade fair which included the construction of two stands, the cleaning of those stands during the exhibition, and the provision of staff and the transport of equipment. The ECJ worked on the premise that these services were "advertising services" within the meaning of Article 9(2)(e), but the questions to be answered were: first whether that Article applied to advertising services supplied indirectly to the advertiser and invoiced to a third party who in turn invoiced them to the advertiser, and secondly whether the provision was applicable if the advertiser did not produce goods or services in the price of which the cost of the advertising services was included (the latter question arose because the advertising was provided to a government department).

54. The court held at [17] that Article 9(2)(e) must be treated "as applying not only to advertising services supplied directly and invoiced by the supplier to a taxable advertiser, but also to services supplied indirectly to the advertiser and invoiced to a third party who in turn invoices them to the advertiser." It followed that the indirect nature of the services did not constitute an obstacle to the application of that Article. And at [28] that it was not relevant whether or not the indirect recipient advertiser included the cost of those services in goods or services it sold.

55. Mr Brown relies on *Inter Mark Group sp z.o.o.sp v Ministre Finansow* C-530/09. Inter Mark proposed to supply temporary exhibition stands to clients presenting their services at such exhibitions. The provision of the stands would be preceded by the drawing up of a design and could include the transport and assembly of the stand. The ECJ was asked whether the services would fall within Article 9(2)(c) 'events' or Article 9(2)(e) advertising. Unlike the advocate general, who opined that the service was of Article 9(2)(c) 'events', the court did not give a definitive answer[1], repeating the formulations for the nature of advertising services, and of 'events' from *France* and *Gillan*, and holding in its disposition that the service came was "liable to come within the scope of:

> Article [9(2)(e)] in the case where that stand is designed or used for the purposes of advertising;
>
> Article [9(2)(c)] in the case where the stand is designed and provided for a specific fair or exhibition on a cultural, artistic, sporting, scientific, educational, entertainment or similar theme or where that stand corresponds to a model in respect of which the organiser of a specific fair or exhibition has prescribed the form, size, material composition or visual appearance;
>
> Article [9(2)(g)] in the case where the temporary provision, for payment, of the constituent material elements of that stand constitutes a determining element of that supply."

56. Mr Brown does not argue that the place of FGS' supply is determined by the Article 9(2)(e) provisions. That is because that Article applies only where the customer is established outside the Community or within the Community "but not in the same country as the supplier". In this case FGS and its sister companies were all established in Italy with the result that the Article is not directly applicable. But, he says that the nature of the supply in question is such that it would fall within that Article and therefore would not fall within Article 9(2)(c) and, because it does not fall within Article ((2)(c), the place of supply is determined by the general rule; thus:

> (1) for supplies before 1 January 2010, it is the place of establishment of supplier - that is to say Italy because FGS was established there; and
>
> (2) for supplies after 1 January 2010, it is the place of establishment of the customer - that is to say Italy because the sister companies were established there.

All roads, he says, lead to Rome.

Discussion

57. There was no doubt, and it was common ground, that FGS supplied its sister companies with a single composite service: the various elements were plainly so closely linked that they formed a single indivisible economic supply which it would

[1] Its answer having something of the nature of the advice given by the Oracle at Delpi to Croesus, King of Lydia

be artificial to split. The determination of the place of the supply thus depended upon the nature of that single service (*Levob*: paragraph 18).

58. There seemed to me to be no difference between the nature of the supply made in 2008 and that in 2010.

59. In *Gillan Beach* the ECJ, at [15 and 16], reiterated the conclusion in *Dudda* that the general rule in Article 9(1) in no way took precedence over Article 9(2). One had to start by determining whether "in the light of its purpose" Article 9(2) embraced the relevant supply. It seems clear to me that the same approach is applicable in considering the equivalent provisions in the Principal VAT Directive: as a result it is only if FGS' supply does not fall within specific provisions that the general rule will apply.

60. It was not suggested to me that the services fell within any description of Aricle 9(2) services other than advertising or events.

61. A conclusion that FGS' services fell within Article 9(2)(e) advertising services would not mean that that Article operated to determine the place of supply of the services for the reasons set out in paragraph [56] above. Thus the aim of my enquiry is limited to determining whether or not the supplies fall within Article 9(2)(c) 'events'. If they do the supply took place in the UK ; if they do not it took place in Italy.

62. However, it does not seem to me that this makes the consideration of "advertising services" irrelevant. That is because, if the nature of the Article 9(2) services they are mutually exclusive, then a service which would, but for the place of establishment of its supplier or customer, fall within the prescriptions of the advertising article, could not be regarded as falling by default as within the provisions of Article 9(2)(c) 'events'.

63. It seems to me that there are two reasons for regarding the nature of the services which fall within the terms of the various provisions of Article 9(2) as mutually exclusive, and that as a result it is relevant to consider the distinction between Article 9(2)(e) advertising services and Article 9(2)(c) 'event' services in determining the nature of FGS' supply even though the paragraph (e) provisions are not directly applicable to it.

64. The first of these reasons is that if a service could fall within both those descriptions but its nature meant that one of the indents of Article 9(2)(e) was more appropriate, then the place of supply of that service would differ according to whether the supplier and the customer were established in the same State - the place of supply being that of the customer if the customer and supplier were in the same State (because Article 9(2)(e) would not apply and Article 9(2)(c) would) and that of the physical activity when they were in different States (because in that case Article 9(2)(e) would apply). So that for example the place of supply to a German customer of staff in France for an advertising event would be in Germany if the supplier was in

Poland, but in France if the supplier was in Germany. That result seems to me to be illogical and to conflict the purpose of the provisions.

65. The second reason is that that result appears to me to be inherent in the reasoning of the CJEU in *Inter Mark* and *Gillan*.

66. In *Gillan* the Court at [30] asked itself whether the boat show organiser's activities fell within Article 9(2). Having asked that broad question the court then fastened on the provisions of paragraph (c) 'events', and, having concluded at [27] that the supply fell within (c) said, at [28], that in the light of that conclusion "there is no need to adjudicate on whether the service could fall within any other category of services mentioned Article 9(2)". That conclusion suggests that the Court considered that the descriptions of services in Article 9(2) were mutually exclusive.

67. In *Inter Mark* the Court was asked specifically whether the proposed supply fell within either Article 9(2)(e), advertising services, or Article 9(2)(c) 'events'. Thus the question raised the two possibilities.

68. The Court, having set out the questions said:

> "[17] In order to provide a useful answer to the referring court, it is *first* necessary to examine whether ... [the] supply ... is liable to come within the scope of [advertising services]."[my italics]

69. It then held at [20] that the design and temporary provision of the stand would fall within that advertising article where it was used for the purposes of message dissemination (as described in [16] of *France*) or where it formed an inseparable part of the advertising campaign. It then said:

> "[22] Further, insofar as, in such a case [i.e. where the advertising services conditions were not met], the supply of services does not come within the scope of [the advertising services provision], it will be necessary to establish whether that supply is liable to come within the scope of [paragraph (c) 'events']."

70. The language of the Court ("first" and "in so far as…the supply…does not come…") suggests either (i) that the provisions are mutually exclusive, ie that it is necessary only to consider paragraph (c) 'events' if the advertising services conditions are not met, or (ii) that Court considered one provision trumped the other - and there may be some hint of that statement that advertising provisions must be considered "first". But the lack of any express reasoning for an order of preference, numerical or otherwise, persuaded me that the Court regarded the activities as mutually exclusive.

Article 9(2)(e) advertising services

71. I have no doubt that the services which FGS supplied to its sister companies were: (1) designed and used for the purposes of the dissemination of messages intended to inform potential buyers of the existence or quality of the products offered by those companies with a view to increasing the sales of such products, and (2) formed an inseparable part of the centrally coordinated advertising campaigns of the group companies by contributing to and conveying their marketing messages: the

presence at the enclosure of employees of the group companies indicated that integration.

72. As a result, because of the mutual exclusivity of the nature of the services described in the Article 9(2) provisions, the supply cannot fall within Art 9(2)(c) 'events'. Therefore the place of supply falls to be determined under the applicable general rule, and is Italy (see [56]).

73. But, if I am wrong, and a conclusion that the supply was of advertising services does not preclude a conclusion that it falls within Article 9(2)(c) 'events', I explain in the following section why the supply does not in my view fall within that provision.

Article 9(2)(c) 'event' Services

Any fair or exhibition?

74. FGS' supply may be described as organising an exhibition. The new version of Article 9(2)(c) sets out the specific activities to which the services must relate and continues (with the new part underlined):

> "... entertainment or similar activities, such as fairs or exhibitions, including the supply of services of the organisers ...".

75. I do not regard the words "such as fairs or exhibitions" as meaning that anything which could be called a fair or exhibition falls in this provision. The comma proceeding it and the words "such as" make clear to me that such fairs or exhibitions must relate to the specified or similar activities. The words indicate that the fact an activity is a fair or exhibition will not prevent it from being similar to, or one of, the specified activities, but they do not indicate the intention to create a new free standing category of activity.

76. I have noted at [13] that the ECJ held in *Gillam* that an inclusive service provided by an organiser to exhibitors at a fair "or in an exhibition hall" fell within Article 9(2)(c) 'events' (I have set out the Court's reasoning at [49] above). But (a) that was in the context of a boat show to which one would assume the public had access for entertainment or education, and (b) the similarity between sport or entertainment and boats is not difficult to understand. Further, in *Inter Mark* (see the disposition quoted at [53] above) the CJEU specifically limited the nature of the exhibition or fair to one which was on a specified or similar "theme". It seems to me therefore that *Gillam* and *Inter Mark* do not require that any fair or exhibition automatically falls within Article 9(2)(c) 'events'.

77. To this extent the words of para 4 Sch 4A, "(including fairs and exhibitions")", may suggest an embrace greater than that of the Directive if they could mean that any form of fair or exhibition automatically falls within the provision. To that extent it would be necessary to read those words conformably with the Directive.

The nature of the activities to which the services must "relate"

78. Mr Jones says that Article 9(2)(c) refers to services *relating* to particular activities: the question is not the nature of the services, but about the nature of the event. Thus in paragraphs [23] to [27] of the judgement in *Gillan* quoted above the ECJ was concerned with the nature of the event and in particular that the event was at a specific location.

79. Mr Jones argues that a particular distinctive feature of the activities within Article 9(2)(c) 'events' is the ability to identify a specific place at which the event takes place. That was the principal quality of a fair or show which allowed it to be assimilated within the specified activities. He suggests that *Inter Mark* may be read as suggesting that if a single location may be easily identified that indicates that an Aricle 9(2)(c) classification is to be preferred.

80. I agree that the first question must be the nature of the activity or event to which the supply relates. I also agree that an easily identifiable place and occasion is one of the criteria which may qualify activities under this paragraph, but in my view it is only one. Nor do I read the decision in *Inter Mark* as indicating that the identification of a specific location is a reason for preferring paragraph (c) over paragraph (e): that would be inconsistent with the order in which the Court took the particular Articles.

81. But it seems to me that in addition to the specific location of the activity the important identifying features of such activities or events also include:

(1) that the theme of the activity is something similar to the specified services;

(2) that the activity involves supplies to a number of people who are final consumers;

and that the service supplied by FGS does not possess these qualities.

82. As the language of the Court in *Gillan* indicates, the possession of all the features is not necessary for qualification as an Article 9(2)(c) 'events' service: they are indicia rather than conditions, and their importance may vary from case to case.

(1) That the theme of the activity is something similar to the specified services.

83. This formulation was used in its disposition by the CJEU in *Inter Mark*: a "specific fair or exhibition on a cultural, artistic, sporting, scientific, educational, entertainment or similar theme".

84. In *Gillan* the Court (at[23] see para 48 above) identified four common features of the specified activities: (i) the provisions of complex services, (ii) provision to all people taking part in the specified activities; (iii) a specific event and (iv) an easily identifiable place of physical performance. It found that the second of these, provision to all people taking part in the activities was satisfied by the "purpose...of presenting information, goods, or events in such a way as to promote them to visitors" [25]. It seems to me that the court could not have reached this conclusion unless it regarded that purpose as being a "theme" similar to that of providing the specified activities to

the visitors. The presentation "information" to visitors at a boat show to my mind has that similarity (being similar to education or entertainment).

85. As a result it does not seem to me that every fair or exhibition will satisfy this test. In particular provision made for the purpose of persuading attendees to buy something is not similar to the provision of education or entertainment or any of the other specified activities. The purpose of the show or fair considered by the CJEU in *Gillan* was different from the purpose of Finmeccanica's enclosure. It does not seem to me that it had a similar theme.

(2) A supply to a number of people who are final consumers.

(a) a number of people

86. At [23] in *Gillan* the Court identified one of the features which were common to the specified services in paragraph (c) as being "the fact that those services are generally provided for a number of different recipients, that is to say, all the people taking part in a variety of capacities, in [the specified activities]".

87. Mr Jones notes that in *Inter Mark* the Court referred to the other common features identified in *Gillan* (specific events, identifiable place and complex services) but did not refer to the criteria of the number of people. He suggested therefore that this feature was less important. However in *Kronospan* (quoted by the advocate general in *Inter Mark)* it was this characteristic and none of the others which was applied by the Court, which, noting that Kronospan's services were supplied to only one recipient, held that as a result they did not fall within paragraph (c). It seems to me therefore to remain an important feature.

(b) Final consumers

88. For the reasons in the following paragraphs, it seems to me that the central activity to which this article applies is also typically one in which those numerous people are final consumers. That is to say non taxable persons who bear the cost of the tax. These are the people who attend the event and receive in various capacities the complex services. Generally they will pay for these services: as the advocate general in *Dudda* recognised at [45] as "regards the administration of turnover tax at the place where the principal artistic or entertainment service is performed the organiser ... will be responsible ... for the payment of turnover tax ... on ticket sales effected by him."

89. It seems to me that the absence or presence of nontaxable persons as the final consumers of the event may not be determinative, but its absence will generally suggest that the event is not of the type intended by Article 9(2)(c) 'events'.

90. First it is a general principle of VAT that it should be charged at the place of consumption. Article 9(2)(c) thus ensures that, for example, an itinerant entertainer or lecturer pays VAT in the country in which her performance is paid for by her audience, not her home State.

91. Second, whereas Article 9(2)(e) supplies, including advertising services, are expressly limited to supplies between taxable persons - business to business supplies – (and as the ECJ said at [15] in *France* this "customary" feature of advertising supplies is to be taken into account in interpreting "advertising services"), the nature of the principal activity (the activities to which the supply must relate) in Article 9(2)(c) 'events' is typically an event at which customers are not taxable persons but final consumers.

92. Third, running through the list of specified services is a strong vein entertainment, and typically entertainment is supplied to final non business consumers Normally it is paying individuals acting as non taxable persons who go to plays, concerts, art exhibitions, football matches, scientific talks, or a university lecture, or who otherwise consume entertainment. It is equally true generally of fairs and exhibitions. In *RAL (Channel Islands) v C & E Commissioners [*2005] STC 125, although in the context of a case about entertainment, the CJEU may have recognised this using the following shorthand for Article 9(2)(c):

> "Article 9(2)(c) of the Sixth Directive, which determines the place where "entertainment or similar activities" are deemed to be supplied"

93. Fourth, some emphasis on the non taxable nature of the final consumer can be drawn from the purpose of the provision. In *Gillan* the Court considered the common features "in the light of the objectives" of the provision (see [22] quoted above)

94. In both *France* and *Gillan* the CJEU considered the scope of Article 9(2) in the light of "its purpose, which is set out as follows in the seventh recital to the preamble to the Sixth Directive:

> ... the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction between member States, in particular as regards supplies of goods for assembly and the supply of services; ... although the place where the supply of services is effected should in principle be defined as the place where the person supplying the service has his principal place of business, that place should be defined as being the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is indicated in the price of the goods."

95. In *France* the Court that [15] said that this preamble showed that the legislature considered that when the person to whom services were supplied (the customer) sells the goods or services advertised in his own State and charges VAT, the VAT on the advertising should be paid in that same State.

96. In *Gillan* the court that [18] found a similar purpose in Article 9(2)(c), namely that the Legislature considered that "in so far as the supplier provides his service in the State in which such services are carried out and the organiser of the event charges the final consumer VAT in the same State" the VAT charged on the cost components of the complete service paid by the customer must be paid in the State in which the VAT was charged on the supply to the final consumer.

97. Mr Jones says that it is possible for a person to consume a supply and to be a final consumer without paying for the supply. The final consumer is the person who attends the concert, not necessarily the person to whom the ticket was sold.

98. I do not agree. Article 2 of the First Directive described the principle of the common system of VAT as a "tax on consumption exactly proportional to the price of the goods and services". That to my mind indicates that when the CJEU speaks of the final consumer it has in mind a non business consumer who pays the price.

99. I should note that in *Inter Mark* the court did not refer to the recital, but the advocate general did. He concluded at [43] that whether or not the cost of the supply of the services is included in the price of a later supply of goods was irrelevant to the question of whether Article 9(2)(c) 'events' applied. He reached this conclusion after referring to the Court's judgement in 2010 in *Kronospan Mielec* in which the court had said (i) that the seventh recital did not mean that the exceptions to the general principle (the Article 9(2) services) were limited to services which were cost components of a taxable supply, and (ii) that the Sixth Directive "contains nothing which allows the conclusion to be drawn that the fact that the recipient includes the cost of the services not directly, but indirectly, in the price of the goods and services which it offers is relevant for the purpose of establishing whether the service is governed covered by Article 9(1) or 9(2) of the Directive."

100. For the following reasons I was not persuaded that the advocate general's conclusion can be drawn from the judgements cited on this issue and do not believe I am bound by it as the Court did not refer to his reasoning or accept his conclusion.

101. First, the conclusion that Article 9(2) services were not limited to cost components does not help in deciding whether any particular one of those services may or should, or should generally, be a cost component. Further the services in paragraph (e), which are limited to business to business supplies, will by that very limitation be limited to cost components.

102. Second, the conclusion of the court in *Kronospan* in relation to whether the service is covered by Article 9(1) or 9(2) was made in response to the national court's statement that the costs were included indirectly rather than directly in the recipient's supplies. The Court in that case was merely saying that whether the inclusion as a cost component was direct or indirect made no difference.

103. Third, the conclusion of the Court in relation to whether the service was covered by 9(1) or 9(2) was precisely that: it did not impinge upon into which heading of 9(2) the service fell.

Conclusion

104. To my mind the essential characteristic of FGS' supply was that it was something which enabled the recipients of the services to inform current and potential customers of the existence and quality of their company's products and services with a view to encouraging and arranging sales. It was essentially an advertising service.

105. I do not consider that the supply fell within Article 9(2)(c) 'events' because, even though it took place at an easily identifiable place and on an easily identifiable occasion, the other features of this type of supply were not adequately fulfilled:

(1) The theme of the event was not to provide culture, art, sport, education or entertainment. It did not have any similarity to the specified events. It was not an entertainment event but a sales event.

In *Inter Mark* the advocate general opined that the supply of staging etc would be a supply within Article 9(2)(c) and not an advertising service because the "sole purpose of ... supplying stands is ... to allow people actually to participate in the fair by allowing exhibitors to present their products" [59], rather than the "purpose of disseminating a message informing visitors of the qualities of the products and services offered". By contrast the sole purpose of supplying the enclosure was to enable the sister companies to market their products.

(2) Although FGS' supply may be described as organising an exhibition it was not an exhibition which showed any similarity to the specified activities. €14 million was not paid to provide any sort of art, sport, entertainment or even enjoyment to the sister companies or to any final consumers, but to get the attendees to buy the group companies' products.

(3) FGS as an organiser did not make a charge to any final consumer in the UK. FGS cannot be regarded as making a supply to the organiser of the airshow.

(4) I do not regard FGS's supply as made in relation to an event in which the services were "provided for a number of different recipients, that is to say all the people taking part, in a variety of capacities in [the specified services]". Whilst FGS's supply was not to one sister company but to nine of them, each took part in the same capacity, namely that of an advertiser, and the activity they took part in was marketing and selling, not something similar to any of the specified services.

(5) Other people took part in the event - employees of the Finmeccanica group, caterers, invitees to the enclosure but FGS' services were not provided for them.

(6) Even if it is possible to say that those other people were in some way provided services by FGS, they were not final consumers of those services, because they did not pay for them, and as such are not relevant to the categorisation of the supply.

106. I conclude therefore that the supply was not within Article 9(2)(c) 'events' and so was made in Italy.

Other Issues

107. There were a number of specific invoices in the claims made by FGS which HMRC argued did not give rise to refundable VAT even if FGS' supply was properly treated as made in Italy. During the hearing, and as a result of hearing Mr

Napolitano's evidence, HMRC withdrew its challenge to a number of them but two remain.

Claim 1 Invoice 1.

108. This invoice was from Farnborough International Ltd and was stated to be for "sponsorship of the Diamond Jubilee Partner at Farnborough International Airshow 2008". Mr Napolitano was unable to shed any further light on the nature of the supply made to FGS.

109. It seems to me that it was likely that FGS had agreed to make a payment in return for the Finmeccania group's name being identified with some event or area at the air show.

110. Mr Jones argued that this was a supply of advertising services to FGS. As a result the place of supply of those services was Italy and no UK VAT was chargeable. As a result no UK VAT could be refunded.

111. Mr Brown accepted that, looked at on its own the supply seemed to be of advertising services and the place of supply would be in Italy. But he says that it would be artificial to split this supply out from the group of other services being to supplied FGS in connection with the airshow, and taken with them it was a supply made in the UK.

112. Mr Brown's analysis can succeed only if the service can be treated as part of an economically indivisible supply. The provision of goods and services by more than one supplier cannot in my view be regarded as economically indivisible. As a result it is only if the services described in this invoice together with other services rendered by Farnborough International to FGS can be treated as economically indivisible that his argument can succeed. Farnborough International did provide other goods an services to FGS in connection with the airshow. The claim includes separate invoices with varying dates for: structure and infrastructure, tickets, passes, parking permits and courier charges. None of these were in my view capable of being regarded as ancillary to the sponsorship supply or vice versa. The sponsorship supply is in my view commercially and economically separate from the others.

113. I find that this was a single supply of advertising services, and that as a result UK VAT was not chargeable on it. As a result no refund can be made in relation to this supply.

Claim 1 Invoice 9

114. This invoice is from RDR Services Ltd and is stated to be for "amount due for security -- salon at Farnborough". It shows the name address and bank account number of the supplier, a price and an amount of VAT, but does not give the supplier's VAT number.

115. Regulation 178 of the VAT regulations 1995 - in the form in which it had effect prior to 1 January 2010 (the invoice in question was dated 2008)- required that a

person claiming refund of VAT should "furnish ... such documentary evidence of entitlement to deduct VAT as may be required of a taxable person claiming a deduction of tax in accordance with the provisions of regulation 29."

116. Regulation 29 provided:

> "... save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable."
>
> "(2) At a time of claiming deduction of income tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of -
>
> > (a) supplies from another taxable person, hold the document which is required to be provided under regulation 13….
> >
> > …provided that where the Commissioners so direct either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct "

117. Regulation 13 specified the requirement to provide a tax invoice and regulation 14 required that the VAT number of the supplier should appear on the invoice.

118. In relation to materially similar provisions Schiemann J held in *Kohanzad v C & E Commissioners* [1994] STC 967 that the effect of the provision was "that the Commissioners have a discretion to allow credit for the input tax notwithstanding that the registered taxable person does not hold such a tax invoice." In relation to the exercise of that discretion he held the jurisdiction of the tribunal was supervisory: it had to ask itself whether the Commissioners, if they refused to allow a taxpayer to deduct income tax, had acted in such a manner that no reasonable commissioners could have acted.

119. It was not suggested to me that the application of regulations 178 or 29 were anything other than within the competence conferred on the UK by the relevant Directives. It was clear that the requirements in relation to the holding of an invoice which applied to a person established outside the UK and in the EU who claimed a refund can be neither more nor less stringent than those which applied to a person who is established in the UK and sought to exercise the right to deduct.

120. It therefore seemed to me that if the claimant of a refund presented an invoice which, because it did not contain the supplier's VAT number, did not satisfy the provisions of section 14, the Commissioners had the discretion described by Schiemann J to allow the claim nevertheless. But in relation to that discretion the jurisdiction of the tribunal was supervisory.

121. As the tailpiece to regulation 29(2) shows, the object of the Commissioners in exercising that discretion must to be to determine whether on the evidence before them there had been a VAT charge on the supply made to the claimant. In relation to

this invoice the only information provided to HMRC was the invoice itself and, by implication of its presentation that the supply it described had been received and paid for by FGS. It seems to me that HMRC could reasonably not be satisfied on the basis of that evidence that UK VAT had been borne on the supply. As a result I cannot interfere with their decision not to allow a refund for the VAT stated on it.

Disposition

122. Save in relation to the VAT applicable to Invoices 1 and 9 of Claim 1, I allow the appeal.

Rights of Appeal

123. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 27 February 2014